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**ORIGINAL**

Date: May 29, 1996

To: Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

Re: Commercial Leased Access; FCC 96-122; MM Docket No. 92-266; CS Docket No. 96-60

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FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554


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**COMMENTS:**

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Judith L. Neustadter  
Attorney at Law

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**Order on Reconsideration  
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FCC 96-122  
MM Docket No. 92-266; CS Docket No. 96-60**

**Paradise Television Network, Inc.  
May 29, 1996  
Reply Comments**

**I. Introduction.**

Paradise Television Network, Inc. ("Paradise"), through its attorney, hereby submits its Reply Comments to the Order On Reconsideration of the First Report and Order and Further Notice of Proposed Rulemaking ("Order on Reconsideration"), adopted by the Federal Communications Commission (the "Commission") on March 21, 1996.

Paradise leases a cable channel from two cable systems serving most of the Island of Maui in the State of Hawaii. The channel is known as the "Visitor Channel." The Visitor Channel broadcasts information to Maui visitors and residents about dining, entertainment, activities, and the like on the island. Paradise is not affiliated to the two cable operators. Paradise's operations are advertiser-supported.

Paradise has previously participated in this docket. Paradise petitioned the Commission for reconsideration of the order setting the "highest implicit net fee" as the formula for determining the maximum reasonable rate a cable operator may charge an unaffiliated programmer to lease a channel.<sup>1</sup> See Petition of Paradise Television Network, Inc., for Partial Reconsideration and/or Clarification, dated June 21, 1993 (the "Petition").

In the Petition, Paradise suggested that the Commission should change its formula to set a maximum fixed rate per subscriber applicable to all cable systems. Setting a maximum fixed rate per subscriber would promote cable programming diversity, the primary intent of Congress in establishing the maximum reasonable rate concept. Paradise proposed a maximum fixed rate of \$.30 per subscriber per month without complicated formulas.

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<sup>1</sup> In its Petition, Paradise also sought clarification regarding how the "highest implicit net fee" applies in the context of a multiple tier system. Paradise notes and appreciates the Commission's efforts in clarifying this issue. See, e.g., Order on Reconsideration, §36.

After reviewing and analyzing the Order on Reconsideration, Paradise still maintains that the best way to determine the maximum reasonable rate a cable operator may charge an unaffiliated programmer to lease a channel should be to set a maximum fixed rate per subscriber per month. Setting a fixed rate will avoid, among other things, complex accounting disputes leading to lengthy and expensive arbitration or litigation, which only serves to delay implementation of the intent of Congress in establishing the maximum reasonable rate concept.

## II. Reply Comments.

Paradise's specific reply comments follow:

(a) Cable Operators Should Not Be Allowed to Calculate Their Own Operating Costs. The cable operators appear to have unfettered authority to determine their own operating costs for the purposes of calculating the maximum reasonable rate under the calculation proposed by the Commission. See, e.g., Order on Reconsideration, §§ 77, 78 (references to operators' calculating operating costs). Moreover, it appears that it will be exceptionally difficult, time consuming, and expensive for a programmer to contest the operator's calculated operating costs. See Order on Reconsideration, §137 (the Commission proposes that a programmer not be permitted to lodge a complaint that the maximum rate was calculated incorrectly unless an independent certified public accountant has first reviewed the operator's calculations and made an independent determination of the maximum rate). Under these circumstances, and with clever accounting practices undoubtedly employed by cable operators, it is virtually inevitable that an operator will be able to unrealistically inflate its operating costs to unfairly increase the maximum reasonable rate, purportedly in reliance on so-called proprietary information.

Paradise suggests that any alternative removing full responsibility from the operator in determining the applicable operating cost would be helpful. Similarly, requiring the operator to share, if not fully carry, the expense of an independent audit would likely deter operators from abusing their discretion in determining their own operating costs. The solution would be a fixed rate of \$.30 per subscriber per month.

(b) Cable Programmers Must Have Enforceable Long-Term Lease Agreements. The Commission's proposed methodology allows the cable operators to switch to market rates once the set-aside requirements are met. See, e.g., Order on Reconsideration, §§ 9, 10. Operators would be permitted to revise channel selections annually (see Order on Reconsideration, §76), and to annually determine the new maximum rate based on whatever channels are designated (see, e.g., Order on Reconsideration, fn. 122 and §101 ). Moreover, once the proposed rules are adopted, operators would be required to implement the adopted formula for programmers already leasing channels. See Order on Reconsideration, §98. Accordingly, it appears from the Order on Reconsideration that there may not be sufficient safeguards to protect those programmers who (i)

already lease a channel or (ii) do enter into a lease but wish to do so for longer than a one-year term.

A cable programmer leasing a channel faces extraordinary start-up expenses, in addition to anticipated operating expenses, including substantial monthly lease payments. Typically, the programmer will need outside financing from a bank or other lending institution or investors to be able to lease a channel. No legitimate lender will finance such an operation without reviewing long-term projections and without being offered long-term security such as a long-term cable channel lease.

Therefore, Paradise suggests that safeguards be included in the rules to afford programmers long-term certainty so they will be able to successfully obtain financing necessary to lease and operate a channel. Furthermore, it would be helpful if incentives were offered to the operators to enter into long-term leases. And why not only allow market rate leases when a programmer who has already leased a channel terminates the lease, instead of allowing the operator to lease one year using the operating cost formula, but turn around and raise the rent to market rate the next year, solely because the set-aside requirements have been filled. Finally, if in fact the Commission by its language in §98 of the Order on Reconsideration intends to make prior leases unenforceable, that should be limited to only those prior leases which require payments in excess of that allowed under the newly calculated maximum reasonable rate. Programmers need the protection of the maximum reasonable rate, and they also need more certainty, security, and longevity.

(c) Programmers Should Not Be Required to Subsidize Operators' Channel Bumping Costs. It appears that the Commission considers the cost of bumping non-leased access programming part of an operator's operating costs to be included in calculating the maximum reasonable rate. See Order on Reconsideration, §69. A leased access programmer should not be required to recompense an operator for wrongfully using a channel which should have been leased years before to a non-affiliated programmer. Therefore, Paradise suggests that this cost should not be included in determining an operator's operating cost.

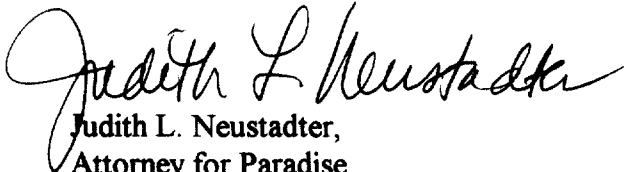
### III. Conclusion.

Paradise appreciates the opportunity offered by the Commission to comment on its recent order. Paradise hopes that the Commission will understand the importance of simplifying the determination of the maximum reasonable rate and reconsider use of a fixed rate per subscriber

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per month. However, if the Commission is intent on proceeding with its newly proposed formula, Paradise respectfully requests that consideration be given to the issues raised in these comments.

Sincerely yours,



Judith L. Neustadter,  
Attorney for Paradise  
Television Network, Inc.

cc: Mr. James T. Kartes  
President  
Paradise Television Network, Inc.